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Privatization of the Building Inspection Function: An Alternative to Municipal Liability

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PRIVATIZATION OF THE BUILDING INSPECTION FUNCTION: AN ALTERNATIVE TO MUNICIPAL LIABILITY

I. INTRODUCTION

The demise of municipal immunity has introduced a new defendant into the arena of construction litigation.[1] Traditionally, dissatisfied building owners sued contractors, architects, and electricians to recover for defective structures.[2] The shield of sovereign immunity prevented property owners from joining municipal officials as defendants in suits for negligent building inspection.[3] Recently, however, several jurisdictions have limited municipal immunity in construction litigation,[4] resulting in increased lawsuits against local governments.[5]

1. *See infra* notes 24-33 and accompanying text (discussing the judicial and statutory abolition of municipal tort immunity). Municipal immunity stems from federal tort immunity. Governmental tort immunity provides that federal, state, and local governments are free from liability for tortious conduct, unless the governing body statutorily consents to be sued. BLACK'S LAW DICTIONARY 626 (5th ed. 1979). *See also* Comment, Owen v. City of Independence: *The Demise of Municipal Immunity*, 21 URB. L. ANN. 241 (1981) (discussing the impact of the *Owen* Court's decision to eliminate municipal immunity in § 1983 actions).

2. *See, e.g.*, Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983) (building owners sued developer for collapse of defective sea wall); Navajo Circle, Inc. v. Development Concepts, Corp., 373 So. 2d 689 (Fla. Dist. Ct. App. 1979) (condominium association sued both the architect and the contractor for a defective roof).

3. *See infra* notes 16-19 and accompanying text.

4. *See infra* notes 156-173 and accompanying text (discussing exceptions to the rule of municipal immunity for negligent building inspection).

5. In recent years, plaintiffs in construction litigation have shifted their attention from standard construction defendants toward municipalities. Plaintiff building owners

There is a lack of uniformity among the states concerning the issue of municipal liability for negligent building inspections.[6] Some courts are reluctant to hold a public official to the same degree of care as a private individual for similar tortious conduct.[7] Customarily, a property owner brings a negligence action for injuries resulting from the failure of the municipality's building inspectors to discover a statutory violation.[8] Although courts usually find municipalities immune from liability,[9] there is a growing trend toward holding local governments

institute actions against municipal officers claiming that the owners incurred damage by relying upon municipal approval of building plans and inspection of construction. *See infra* notes 83-86 and accompanying text.

6. For purposes of this Note, "negligent building inspection" refers to all types of negligent or intentional failure to follow statutory safety inspection codes. "Code" refers to any type of municipal safety code, including building, fire, occupancy, and electric codes.

In the United States there are several building and safety codes designed to regulate construction. Three major building codes cover various geographical regions. The Pacific coast region applies the UNIFORM BUILDING CODE. The South follows the SOUTHERN BUILDING CODE. The BUILDING OFFICIALS CONFERENCE OF AMERICA (BOCA) BASIC CODE guides construction work in the eastern and central states. These codes set minimum standards for public safety. Committees of experts on construction, fire prevention, and engineering developed the codes. *See* Blawie, *Legal Liability of Building Officials For Structural Failures*, 57 CONN. B.J. 211, 213 (1983) (discussing the Connecticut State Building Code, CONN. GEN. STAT. ANN. §§ 29-251 to 29-282 (West Supp. 1988)), parallels the BOCA BASIC BUILDING CODE).

7. Although several jurisdictions enacted tort claims acts restricting governmental immunity, courts are reluctant to interpret those statutes as imposing liability on municipalities in the same manner as private tortfeasors. *See, e.g.*, Massachusetts Tort Claims Act, MASS. ANN. LAWS ch. 258, § 2 (Michie/Law Co-op. 1980) (public employers shall be liable for the negligent acts or omissions of their employees "in the same manner and to the same extent as a private individual under like circumstances"). In Dinsky v. Framingham, 386 Mass. 801, 438 N.E.2d 51 (1982), the Massachusetts Supreme Judicial Court interpreted this statute to prevent municipal liability for negligent building inspection. *But see* Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979) (interpreted Iowa Tort Claims Act to impose municipal tort liability, based on breach of statutory duty, similar to private actors).

8. *See* Annot, 41 A.L.R. 3D 567, 569 (1972). A building owner's battle for recovery is difficult. Finding negligent inspection by a municipality requires: (1) evidence of a prior building code violation, (2) the building inspector's negligent act of failing to notice or remedy the violation, and (3) injury or loss of plaintiff's property as a result of the inspector's negligence. Comment, *Local Government Liability in Virginia for Negligent Inspection of Buildings, Structures and Equipment*, 18 U. RICH. L. REV. 809, 812-13 (1984).

9. *See, e.g.*, Besserman v. Town of Paradise Valley, Inc., 116 Ariz. 471, 569 P.2d 1369 (Ariz. Ct. App. 1977) (town not liable for alleged negligent and malicious inspection of home); Georges v. Tudor, 16 Wash. App. 407, 556 P.2d 564 (Wash. Ct. App. 1976) (no recovery for injury sustained from alleged negligent performance of building

liable for personal injuries and loss of property resulting from negligent building inspections by municipal officials.[10]

When deciding a claim of negligent building inspection, courts must balance two competing goals: shielding municipalities from the economic burden of liability and compensating the victims of a public official's tortious conduct.[11] This Note focuses on this dichotomy and explores divergent state approaches to the issue of whether courts should hold a municipality liable for the negligent failure of its employees to enforce building safety codes. Specifically, Part II discusses the decline of the sovereign immunity doctrine as applied to municipal liability for negligent building inspections. Part III examines distinctions courts apply to governmental activities to preserve municipal immunity in this area. Finally, Part IV suggests alternatives to the disparate treatment of municipal liability for the negligent performance of a building inspector's duties.

II. THE DECLINE OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity emanated from the English theory that "the King can do no wrong."[12] Ironically, this maxim originally meant that the King was not privileged to commit a wrong.[13]

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inspector's duties); Victoria Village "G" Condominium Ass'n v. City of Coconut Creek, 488 So. 2d 900 (Fla. Dist. Ct. App.), *appeal dismissed*, 497 So. 2d 1218 (Fla. 1986) (county not liable for negligent issuance of certificate of occupancy).

10. The recent trend toward imposing liability received much attention. *See generally* Comment, *Municipal Liability for Negligent Building Inspections—Demise of the Public Duty Doctrine?*, 65 IOWA L. REV. 1416 (1980) (analyzing the status of the public duty doctrine in construction litigation) [hereinafter cited as *Demise*]; Comment, *Municipal Liability for Negligent Building Inspection*, 23 LOY. L. REV. 458 (1977) (advocating jury trial to determine extent of municipal tort liability in negligent inspection actions) [hereinafter cited as Comment]; Note, *Rebuilding the Wall of Sovereign Immunity: Municipal Liability for Negligent Building Inspection*, 37 U. FLA. L. REV. 343 (1985) (discussion of municipal liability for negligent inspection under current Florida law) [hereinafter cited as *Rebuilding the Wall*]; Note, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537 (1983) (categorization of the states according to scope of governmental immunity currently recognized) [hereinafter cited as *National Survey*]. *See infra* notes 125-155 and accompanying text.

11. *See infra* notes 176-190 and accompanying text.

12. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 1-2 (1924-25) [hereinafter cited as Borchard I].

13. *See* D. MANDELKER, D. NETSCH & P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 429 (1983) [hereinafter cited as MANDELKER, NETSCH & SALSICH].

Inverse application of this principle, however, resulted in the barring of suits against the sovereign.[14] The sovereign immunity doctrine first barred plaintiffs from seeking redress against the government in the eighteenth century English case of *Russell v. The Men of Devon.*[15] The *Russell* rule first appeared in the United States in 1812.[16] Most American courts subsequently adopted the governmental tort immunity principle.[17]

Notwithstanding its mistaken introduction into the American judicial system,[18] proponents of the municipal immunity doctrine have formulated several justifications for its existence.[19] Several prevailing theories support municipal tort immunity: (1) governmental entities are unique in performing activities not undertaken by private individuals;[20] (2) a municipality derives no pecuniary benefit from the exercise of public functions;[21] (3) revenue raised for the public good should not be used to pay tort judgments;[22] and (4) courts should not hold a mu-

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14. *See* Leonard, *Municipal Tort Liability: A Legislative Solution Balancing the Needs of Cities and Plaintiffs*, 16 URB. L. ANN. 305, 308 (1979) (discussing traditional and modern doctrines of governmental tort immunity) [hereinafter cited as Leonard].

15. Russell v. The Men of Devon, 100 Eng. Rep. 359 (K.B. 1788).

16. Governmental immunity soon after appeared in the United States in Mower v. Leicester, 9 Mass. 147 (1812). In Whitney v. City of Worcester, 373 Mass. 208, 366 N.E.2d 1210 (1977), the Massachusetts Supreme Judicial Court stated its intention to abrogate the governmental immunity doctrine, followed by the legislature's abrogation, codified at MASS. ANN. LAWS ch. 258, §§ 1-9 (Michie/Law Co-op. 1980 & Supp. 1987)). In *Russell*, the English court based its finding of immunity on the fact that Devon county was unincorporated and thus had no funds to support a judgment for damages. In *Mower*, the New England court relied on *Russell* to deny relief to an individual injured by a defective bridge. *Mower*'s reliance on the *Russell* rationale was misplaced since Leicester was incorporated. *See* Borchard I, *supra* note 12, at 41-43; MANDELKER, NETSCH & SALSICH, *supra* note 13, at 429-30.

17. *See* James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 621-23 (1955) (discussing the evolution of sovereign and governmental immunity) [hereinafter cited as James].

18. *See supra* notes 13-16.

19. Borchard, *supra* note 12, at 41-43, states:

> The great majority of the courts . . . have put the immunity from substantive responsibility on the ground that the county was created for public purposes, charged with the performance of duties as an arm or branch of the state government, and cannot therefore be liable for failure to negligence in the performance of its public—sometimes even called corporate—duties.

Id. at 43.

20. *See supra* note 19.

21. *National Survey*, *supra* note 10, at 539.

22. *See* Leonard, *supra* note 14, at 308 n.21. ("[T]he public policy rationale behind

nicipality liable for torts committed in the performance of its governmental duties.[23]

The severity of the local government immunity doctrine led a majority of states to enact legislation that partially waives sovereign immunity.[24] Although many state courts abolished sovereign immunity, legislation subsequently reinstated immunity for certain actions.[25]

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the early English cases was that it is better for the injured individual to bear the loss than to inconvenience the public.").

23. Justice Holmes posited this rationale in Kawanakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("[A] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

24. For a thorough classification of the 50 states according to degree of immunity retained, *see National Survey*, *supra* note 10, at 540-47.

Following the judicial abrogation of municipal immunity in Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962), the Minnesota Legislature adopted the Minnesota Municipal Tort Liability Act. MINN. STAT. ANN. §§ 466.01-466.17 (West 1977). The Act provides: "Subject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." MINN. STAT. ANN. §§ 466.02 (West 1977). Significantly, § 466.03 of the Minnesota statute imposes limited exceptions under which a municipality will *not* be held liable in tort. One important exception immunizes municipalities from liability for torts resulting from the failure or negligent performance of a discretionary function or duty. MINN. STAT. ANN. § 466.03(6) (West 1977). *See* Note, *Government Liability for Negligent Fire Inspection*: Hague v. Stade, 66 MINN. L. REV. 1164, 1166-67 (1982) (discussing public duty doctrine as applied to negligent fire inspection suits) [hereinafter cited as Note, *Fire Inspections*].

Many other state legislatures enacted statutes similar to the Minnesota Municipal Tort Liability Act, defining and greatly restricting state and municipal liability. *See generally* ALASKA STAT. §§ 09.50.250-09.50.003 (1973); CAL. GOV'T CODE §§ 810-996.6 (West 1980); FLA. STAT. ANN. § 768.28 (West 1986); MASS. ANN. LAWS §§ 1-9 (Michie/Law Co-op. 1980 & Supp. 1987)); NEV. REV. STAT. §§ 41.0305-41.039 (1985).

25. The first major judicial declaration against maintaining sovereign immunity was Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). The *Hargrove* court stated, "The time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government." *Id.* at 132.

Many other state judiciaries abrogated traditional concepts of sovereign immunity. *See, e.g.*, City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962) (abrogating municipal immunity); *but see* ALASKA STAT. § 09.65.070 (1983) (reinstating immunity for certain actions by a city); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963) (abolishing immunity of all public entities); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (abrogating state immunity) (superseded by CAL. GOV'T CODE §§ 810-996.6 (West 1980)); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. Ct. App. 1964) (abolishing municipal immunity); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977) (abrogating state immunity for negligent maintenance of public roads) (superseded by MO. REV. STAT. § 537.600 (1986));

States rejecting immunity differ greatly regarding the degree of municipal tort liability.[26] The scope of liability ranges from traditional municipal tort immunity, subject only to specific statutory waivers,[27] to its unqualified abolition.[28] A majority of states chose the middle ground of the immunity spectrum,[29] opting for one of two intermediate positions. Some states approach the liability issue by establishing general municipal immunity with a considerable number of exceptions.[30] Other moderate states impose municipal liability for tortious conduct, with exceptions for specific activities.[31] Despite judicial and statutory restrictions of the immunity doctrine, and court-created exceptions limiting municipal liability,[32] building owners lack a guarantee of recovery for negligent inspection.[33]

III. JUDICIAL LIMITATIONS ON MUNICIPAL TORT LIABILITY

Traditionally, three judicial shields preserved municipal immunity for negligent building inspection: the governmental-proprietary distinction; the discretionary-ministerial dichotomy; and the public duty

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Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (abrogating state immunity).

26. *See generally* Carlisle, Coleman, Fontana, Moskowitz & Smith, *Testing the Limits: A Report on the Uncertainties of Governmental Liability in 1982*, 14 URB. LAW. 687, 689-697 (1982) (a state by state analysis of various stances on municipal tort liability for negligent inspection or failure to inspect).

27. *See National Survey, supra* note 10, at 540-41. "Thirteen states have retained the traditional common law notion that a municipality is immune from tort liability." *Id.* In these jurisdictions, courts apply the governmental/proprietary distinction to determine municipal tort liability. Generally, these states classify issuance of building permits as governmental. *Id.*

28. *See National Survey, supra* note 10, at 546. The author describes states advocating total abolition of sovereign immunity as having a "blanket waiver" of immunity. This approach requires a courts to define the scope of governmental liability on a case by case basis. *Id.*

29. Twenty-four states chose a position between the immunity and liability extremes. *Id.* at 530 n.22.

30. In these jurisdictions, "immunity is the rule and liability is the exception." This approach restricts the judiciary because liability can only follow after negligent performance of specifically enumerated activities. *Id.* at 542.

31. In these jurisdictions, liability is the rule and immunity the exception. This approach affords more freedom to the courts to decide when to impose liability. *Id.* at 543.

32. *See infra* notes 34-173 and accompanying text (Part III, Judicial Limitations on Municipal Tort Liability).

33. *See supra* note 7.

rule.[34] Viewed as a reaction to the abrogation of sovereign immunity,[35] the governmental-proprietary distinction was once a prominent defense.[36] The discretionary-ministerial dichotomy, a modification of the governmental-proprietary distinction, is more popular today.[37] Currently, a majority of jurisdictions employ the public duty doctrine to bar recovery from a municipality for negligent building inspections.[38]

A. *The Governmental/Proprietary Distinction*

Local government law dictates that a municipality is liable for the torts of its officers if: (1) a master-servant relationship exists between the municipality and the tortfeasor; (2) the negligent act is within the scope of the officer's duties; and (3) the negligently performed duty is a proprietary rather than governmental function.[39] The third qualification recognizes the dual governing and profit-making character of municipalities.[40] Under the governmental/proprietary analysis, if courts label the negligent activity proprietary, municipal liability is coextensive with that of a private entity.[41] If courts categorize the function as

34. These three judicially created doctrines cushioned the effects of the abrogation of sovereign immunity. Thus, municipal immunity found continued vitality in the courts. *See generally* Leonard, *supra* note 14, at 312-17.

35. MANDELKER, NETSCH & SALSICH, *supra* note 13, at 434. Although some commentators believe that courts originally created the governmental/proprietary distinction to counter the harshness of common law immunity, governments also used the distinction to avoid liability.

36. *See infra* notes 39-52 and accompanying text (discussing the governmental/proprietary distinction).

37. *See infra* notes 53-65 and accompanying text (discussing the discretionary/ministerial dichotomy).

38. Although the public duty rule is often criticized for its unjust results and lack of a sound logical basis, many jurisdictions continue to apply it in negligent building inspection actions. *See infra* notes 95-125 and accompanying text.

39. C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 32.12 (1986); *see also* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02 (3d ed. 1986) (discussing conditions under which municipal tort liability exists).

40. Municipalities engage in governing functions, as well as profit-making proprietary activities. Courts refuse to impose liability if negligent conduct arises from a governmental function. *E.g.*, Summerville v. Board of County Road Comm'rs of Kalamazoo County, 77 Mich. App. 580, 259 N.W.2d 206 (Mich. Ct. App. 1977).

41. *See, e.g.*, Parks v. City of Oklahoma City, 559 P.2d 1266, 1268 (Okla. Ct. App. 1976) ("When [a] City is performing a proprietary function, it has the same responsibility for the acts of its employees as a private entity in the conduct of that enterprise.") (superseded by OKLA. STAT. ANN. § 152.1 (West Supp. 1988)); Leonard, *supra* note 14, at 311.

governmental, the municipality is immune from liability.[42]

Courts have taken numerous approaches in classifying a particular activity as governmental or proprietary.[43] Some jurisdictions label as governmental functions that only a municipality can perform.[44] Another test is whether the act is for the common good, or for the municipality's pecuniary gain.[45] When a municipality realizes monetary benefits, courts declare the activity a proprietary function.[46] Thus, police protection is governmental in nature,[47] and the municipal sale of mineral water is a proprietary function.[48]

Generally, courts found municipal building inspections to be governmental functions,[49] thus barring recovery for negligent inspections as immune governmental activities.[50] The governmental/proprietary distinction, however, caused great confusion.[51] Dissatisfaction with arbitrary line-drawing led courts to retreat from the public versus private

42. *See* E. MCQUILLIN, *supra* note 39, §§ 53.23-53.24 (citing cases holding municipality immune for governmental functions); *see also* MANDELKER, NETSCH & SALSICH, *supra* note 13, at 431-32 (discussing *Bailey v. Mayor of New York*, 3 Hill 531, 38 Am. Dec. 669 (N.Y. Sup. Ct. 1842), the leading case distinguishing between public and private functions).

43. *See generally* Comment, *Local Government Liability in Virginia For Negligent Inspection of Buildings, Structures and Equipment*, *supra* note 8, at 814-16 (discussing various approaches taken by the Virginia courts to distinguish between governmental and proprietary acts); Leonard, *supra* note 14, at 311.

44. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 979-81 (4th ed. 1971); *see also* Whitney v. City of Worcester, 373 Mass. 208, 366 N.E.2d 1210 (1977) (municipality insulated from liability for negligent acts of its employees in performance of strictly public functions imposed or permitted by legislature) (superseded by MASS. ANN. LAWS ch. 258, §§ 1-9 (Michie/Law Co-op. 1980 & Supp. 1987)).

45. Borchard I, *supra* note 12, at 132-34 ("Immunity has been placed on the ground that the city derives no pecuniary benefit from the exercise of public functions.").

46. Comment, *supra* note 10, at 461.

47. *E.g.*, Steele v. City of Houston, 577 S.W.2d 372 (Tex. App. 1979), *rev'd on other grounds*, 603 S.W.2d 786 (1980).

48. New York v. United States, 326 U.S. 572 (1946).

49. *See, e.g.*, E. Eyring & Sons Co. v. Baltimore, 253 Md. 380, 252 A.2d 824 (1969) (court applied a three-part test to determine that city was immune from liability for the collapse of a church inspected by city, declaring the inspection function governmental in nature).

50. *Id.*

51. In Brush v. Commissioner of Internal Revenue, 300 U.S. 352, 362 (1937) (implicitly overruled on other grounds by Graves v. New York, 306 U.S. 466, 486 (1939)), the Supreme Court noted that no other area of the law causes greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipalities. *Liability in Virginia*, *supra* note 43, at 814-15 n.49.

classification of municipal activities.[52]

B. *The Discretionary/Ministerial Dichotomy*

Rejecting the governmental/proprietary distinction, several courts preserved some immunity by differentiating between a municipality's discretionary and ministerial acts.[53] Using this approach, courts found the municipality liable in tort if the questioned activity was ministerial.[54] Courts, however, barred recovery for negligently performed discretionary duties.[55]

The discretionary/ministerial analysis insulates the municipality from liability for tortious conduct resulting from the exercise of an official's discretion.[56] Discretionary activities, or planning decisions, are those which require a government official's personal deliberation, decision, and judgment.[57] Ministerial or operational acts, on the other hand, are those functions which constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice.[58] Courts may impose liability for a negligently performed ministerial act.[59]

The Federal Tort Claims Act (FTCA),[60] which waives sovereign im-

52. *See* W. PROSSER, *supra* note 44, at 978-83 (an extensive review of governmental/proprietary decisions).

53. *See* MANDELKER, NETSCH & SALSICH, *supra* note 13, at 440 ("Despite the declarations concerning the demise of governmental tort immunity, the continued life of the discretionary-ministerial [nondiscretionary] distinction applied to acts of public officials suggests that governmental immunity has been modified rather than abolished.").

54. *See infra* note 58 and accompanying text, defining "ministerial" acts. *E.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) (governmental agent is liable for torts committed when acting in a ministerial capacity) (superseded by CAL. GOV'T CODE §§ 810-996.6 (West 1980)).

55. *Id.* Courts often refer to discretionary acts as legislative, judicial, quasi-legislative, or quasi-judicial functions. *See, e.g.*, Coffey v. City of Milwaukee, 74 Wis. 2d 526, 533, 247 N.W.2d 132, 136 (1976).

56. *E.g.*, *Muskopf*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (government officials are not liable for discretionary acts within the scope of their authority) (superseded by CAL. GOV'T CODE §§ 810-996.6 (West 1980)); *see generally* Comment, *supra* note 10, at 464.

57. *See* W. PROSSER, *supra* note 44, at 988.

58. *Id.* Discretionary acts require "the employee to look at all the facts and act upon them in some manner of his own choosing." Leonard, *supra* note 14, at 314.

59. *See* E. MCQUILLIN, *supra* note 39, § 53.33 (citing cases where courts imposed liability for negligently performed ministerial activities).

60. 28 U.S.C. §§ 2671-2680 (1982).

munity, expressly exempts governments from liability for discretionary activities.[61] Many state statutes modeled after the FTCA also provide governmental immunity for discretionary functions.[62] Since it derives from the separation of powers doctrine,[63] the discretionary exception evidences the judicial reluctance to intrude upon the legislative and executive branches of government.[64] Tort liability resulting from the judicial review of governmental discretionary activities constitutes such an encroachment.[65]

The task of delineating exactly what constitutes a discretionary or ministerial act confused courts[66] because the categories overlap.[67] The Washington Supreme Court in *Evangelical United Brethren Church v. State*[68] devised a four prong test to determine the immunity of various governmental activities.[69] To fall within discretionary immunity under the *Evangelical* analysis, the activity must: (1) involve a basic governmental policy, program, or objective; (2) be essential to that policy,

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61. The discretionary function exception to the Federal Tort Claims Act bars: "(a) [a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. . ." 28 U.S.C. § 2680(a) (1982).

62. *See supra* note 24 (citing examples of various state statutes waiving sovereign immunity yet retaining a discretionary function exception). Additionally, several jurisdictions judicially added the discretionary function exception. *See, e.g.*, Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979); Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

63. MANDELKER, NETSCH & SALSICH, *supra* note 13, at 446-49.

64. *Weiss*, 7 N.Y.2d at 585-86, 167 N.E.2d at 66, 200 N.Y.S.2d at 413. The *Weiss* court stated:

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.

Id. at 585-86, 167 N.E.2d at 66, 200 N.Y.S.2d at 413. *Accord* Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 918 (Fla. 1985).

65. *Commercial Carrier Corp.*, 371 So. 2d 1020.

66. *See* Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 163, 178-82 (1977) (discussing the difficulties courts experience in applying the discretionary/ministerial distinction).

67. *See* Leonard, *supra* note 14, at 315 (no ministerial act is wholly without an element of judgment—even the driving of a nail involves some discretion).

68. 67 Wash. 2d 246, 407 P.2d 440 (1965). The *Evangelical United* court judicially adopted the discretionary function exception.

69. 67 Wash. 2d at 255, 407 P.2d at 445.

program, or objective; (3) involve the exercise of a basic policy evaluation or judgment; and (4) involve a governmental agency acting within the scope of its authority.[70] If the court answers all four preliminary questions affirmatively, then the activity is discretionary.[71] If the court answers one or more of the questions negatively, the test requires further inquiry.[72]

Several courts found fault with the *Evangelical* test[73] and attempted to define further the discretionary/ministerial distinction.[74] Despite its lack of clarity, courts continue to use the planning/operational dichotomy in construction law.[75] Judicial findings of discretionary immunity varied over the years.[76] In several recent cases, however, courts concluded that municipal inspection of buildings is a ministerial/operational level activity.[77] For example, in *R. Landsfield v. R.J. Smith Contractors, Inc.*,[78] a Michigan court of appeals stated that the simple determination of whether a construction project meets building

70. *Id.* The Florida Supreme Court adopted the same test in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). The Florida courts continue to apply the *Commercial Carrier/Evangelical* test. *See infra* note 124 accompanying text.

71. 67 Wash. 2d at 255, 407 P.2d at 445.

72. *Id.*

73. *See generally* Comment, *How Much Wrong Can the King Do? A Look at the Modern Sovereign Immunity Doctrine in Florida*, 13 STETSON L. REV. 359, 366-67 (1984) (discussing confusion resulting from application of the *Evangelical* test as applied in *Commercial Carrier* and its progeny).

74. *See* R. Landsfield v. R.J. Smith Contractors, Inc., 146 Mich. App. 637, 639-40, 381 N.W.2d 782, 783 (1985) (quoting Ross v. Consumers Power Co., *on reh'g*, 420 Mich. 567, 363 N.W.2d 641 (1984)); *accord* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

75. *See supra* notes 57 and 58 and accompanying text.

76. *Compare* Fiduccia v. Summit Hill Constr. Co., 109 N.J. Super. 249, 262 A.2d 920 (1970) (building inspector's duty of issuing a certificate of occupancy requires considerable skill and judgment and is therefore an immune discretionary activity) *with* Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (conducting statutory inspection of a building is not a quasi-judicial act within the meaning of governmental tort immunity).

77. *E.g.*, *R. Landsfield*, 146 Mich. App. 637, 381 N.W.2d 782 (township building inspector's determination of whether construction met code standards is ministerial-operational in nature); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (building inspection function is ministerial). *But see* Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985) (building inspector enforces safety codes pursuant to state police power, thus building inspection is an immune discretionary function).

78. 146 Mich. App. 637, 381 N.W.2d 782 (1985).

code specifications is ministerial-operational in nature.[79]

Similarly, in *Manors of Inverrary XII v. Atreco-Florida*[80] a Florida court found that the examination of plans and on-site inspections to determine building code compliance was an operational/ministerial activity.[81] The municipality may thus be liable for the inspector's wrongful conduct.[82] *Manors* involved condominium owners who suffered monetary loss from numerous construction defects.[83] The condominium association filed a class action suit alleging that the City of Lauderhill was negligent in approving the building plans, inspecting the premises, and issuing a building permit and certificate of occupancy.[84] The condominium association introduced evidence that the building official approved construction which violated the South Florida Building Code.[85] In response to the association's allegations, the city asserted discretionary immunity.[86] The court framed the issue before it as whether the activities of a city building inspector, in approving building plans and construction, are a discretionary-planning activity or an operational activity.[87] Although the court found the city's adoption of the South Florida Building Code discretionary,[88] it concluded that enforcing the building code standards involved purely ministerial acts.[89]

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79. 146 Mich. App. at 640, 381 N.W.2d at 783 (action against township alleging negligent inspection of construction resulting in numerous building defects).

80. 438 So. 2d 490 (Fla. Dist. Ct. App. 1983).

81. *Id.* at 492.

82. *Id.*

83. *Id.* at 491.

84. *Id.*

85. The City of Lauderhill adopted the South Florida Building Code by a special legislative act. *Id.* The code sets forth the procedures for obtaining city approval of construction, which are similar to procedures nationwide. *See supra* note 6. The code provides that two sets of plans for the proposed development must accompany an application for a building permit. 438 So. 2d at 491. The code requires the building official to examine the plans for compliance with the building code. *Id.* If the plans comply, he or she issues a permit to proceed with construction. *Id.* The code requires periodic building inspections. If the construction meets code requirements and the inspector approves the building, the city issues a certificate of occupancy. *Id.*

86. The city argued that the building official's function is discretionary and is part of his planning activity, and thus remains cloaked with sovereign immunity. *Id.*

87. *Id.*

88. The city's choice to use the South Florida Building Code was a discretionary or planning activity. *Id.* at 491-92.

89. The court applied the four prong test adopted in Commercial Carrier Corp. v.

These cases illustrate that discretionary immunity is not a viable defense for municipalities in negligent building inspection suits. Based upon the nature of municipal safety inspection codes, courts will logically classify a building inspector's duties as ministerial.[90] Moreover, both the governmental/proprietary and the discretionary/ministerial dichotomies are deficient in one important aspect: both fail to address whether a municipality owes a duty to persons injured as a result of a negligent building inspection.[91]

C. *The Public Duty Rule*

As an alternative means of limiting governmental liability, several jurisdictions adopted the public duty rule.[92] The rule provides that an official responsible to the general public owes no duty to individual citizens.[93] Thus, the doctrine essentially distinguishes between public and private functions.[94] Courts applying the public duty rule found that municipal building, fire, safety, and inspection codes benefit the general public and not individual citizens.[95] Therefore, to impose municipal liability, a citizen must show that the governmental entity owed

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Indian River County, 371 So. 2d 1010 (1979). *See supra* notes 69-72 and accompanying text.

The dissent in *Manors* was wary of making governmental units insurers of the quality of construction of private development projects. 438 So. 2d at 495-96. Anticipating that the construction industry would rely on governmental inspection to establish compliance with building codes, the dissent contended that municipal liability would encourage careless construction. *Id.* at 495.

90. Most building safety inspection codes delineate specific standards. An inspector's function is to survey plans and construction to see if they meet the requisite conditions. Although this requires an element of judgment, the inspector is merely executing the product of the legislature. Because of the specificity of these codes, courts are unjustified in treating building inspection as a discretionary function, thereby finding immunity in negligent inspection actions. *See* R. Landsfield v. R.J. Smith Contractors, Inc., 146 Mich. App. 637, 640, 381 N.W.2d 782, 783 (1985).

91. Comment, *supra* note 10, at 467.

92. *See generally* 38 A.L.R. 4th 1194, 1196 (survey of various states applying the public duty rule).

93. Halvorson v. Dahl, 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978).

94. This distinction parallels that of the governmental/proprietary dichotomy. *See supra* notes 39-52 and accompanying text.

95. *E.g.*, Duran v. Tuscon, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (fire inspection codes benefit the general public not individual victims); Hannon v. Counihan, 54 Ill. App. 3d 509, 369 N.E.2d 917, 12 Ill. Dec. 210 (1977) (inspection codes for building foundation standards aid the general public not individual plaintiff).

him or her a special duty.[96] When an individual plaintiff establishes this special relationship, the breach of a duty may result in municipal liability for damages.[97]

The following discussion analyzes decisions of various jurisdictions regarding whether a municipality's failure to enforce a building code gives rise to a private cause of action. First, decisions that bar recovery from a municipality under the general duty/special duty test are analyzed. The discussion also considers some recent decisions rejecting the public duty rule.[98]

1. States Adopting the Public Duty Rule

States supporting the public duty doctrine hold that municipalities conduct building inspections exclusively to benefit the general public.[99] The Minnesota Supreme Court established its position on governmental liability for negligent building inspections in *Cracraft v. City of St. Louis Park.*[100] *Cracraft* involved the alleged negligent failure of a city inspector to discover a municipal fire code violation at a high school.[101] Denying relief to the injured students, the court reasoned that the building code required inspections to protect the interests of the munic-

96. *See* Dinsky v. Framingham, 386 Mass. 801, 804, 438 N.E.2d 51, 53 (1982) (town not liable for flooding of plaintiff's home due to negligent inspection because inspector lacked special duty to the plaintiffs).

97. *See* Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975) (discussed *infra* notes 165-73 and accompanying text.

98. The public duty doctrine has been sharply criticized by many courts and commentators. *See* Glannon, *The Scope of Public Liability Under the Tort Claims Act: Beyond the Public Duty Rule*, 67 MASS. L. REV. 159 (1982) (discussing application of the public duty rule in *Dinsky*).

99. This position is stated in 7 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 24.507 (3d ed. 1981):

> The enactment and enforcement of building codes and ordinances constitute a governmental function. The primary purpose of such codes and ordinances is to secure to the municipality as a whole the benefits of a well-ordered municipal government, or as sometimes expressed, to protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals.

Id. at 479.

100. 279 N.W.2d 801 (Minn. 1979).

101. Approximately a month and a half after a city fire inspector conducted his routine inspection of the high school, a 55-gallon drum of highly flammable liquid exploded, injuring several students. *Id.* at 803. The inspector should have recognized that the oil drum constituted a fire code violation and removed it from the premises. *Id.*

ipality as a whole, rather than particular individuals.[102]

Minnesota's continuing adherence to the public duty rule[103] is demonstrated by the recent decision of *Hage v. Stade*,[104] which concerned a hotel fire that caused injuries and deaths.[105] The Supreme Court of Minnesota affirmed the district court's summary dismissal of the victims' complaint,[106] which alleged negligent fire safety code inspection and enforcement.[107] Holding that municipal building and fire codes create a duty to the general public, the court concluded that the victims lacked a cause of action against the city.[108]

Massachusetts recently adopted the public duty rule to protect local governments from liability. In *Dinsky v. Framingham*[109] the Massachusetts Supreme Judicial Court used the public duty doctrine to limit municipal liability for a negligent building inspection.[110] A landowner sued the Town of Framingham for damages sustained when his property was flooded.[111] The landowner alleged that the town was negligent in issuing building and occupancy permits.[112] Concluding that

102. *Id.* at 805. *Cracraft* enumerated four factors for determining whether to impose liability on the municipality: (1) actual knowledge of the dangerous condition by the municipality; (2) reasonable reliance by persons on the municipality's representations and conduct; (3) statutory enumeration of mandatory acts clearly to protect a particular class of persons, rather than the public as a whole; and (4) use of due care by the municipality to avoid increasing the risk of harm. *Id.* at 806-07.

The *Cracraft* court concluded that "[fire] inspections are required for the purpose of protecting the interests of the municipality as a whole against the fire hazards of the persons inspected. . . ." *Id.* at 805.

103. *See generally* Note, *Fire Inspections*, *supra* note 24 (discussing *Hage* and the development of Minnesota's adoption of the public duty rule).

104. 304 N.W.2d 283 (Minn. 1981).

105. *Id.* at 285. Sixteen people died when a hotel in Breckenridge burned. *Id.*

106. *Id.* The district court granted summary judgment in favor of the state and its inspection agencies. The plaintiff appealed.

107. *Id.* The hotel was in violation of the fire code at the time of the fire. Specific violations included lack of smoke detectors, flammable materials stored in the basement, and absence of sprinklers in the hotel. *Id.* Moreover, in violation of the annual inspection requirement, the hotel had not been inspected in over two years. *Id.*

108. *Id.* at 283. The Minnesota Supreme Court relied on the public duty doctrine to find that the city owed no duty to the hotel fire victims.

109. 386 Mass. 801, 438 N.E.2d 51 (1982).

110. *Id.*

111. 386 Mass. at 802, 438 N.E.2d at 52. The building commissioner issued both the building permit, as well as the occupancy permit, even though the building failed to meet department of health requirements regarding the proposed grading and proper drainage system.

112. *Id.* at 51.

the town owed no duty to the property owners, the court declared that the state building code refers only to the public interest.[113] Massachusetts has subsequently applied *Dinsky* to insulate municipalities from tort liability,[114] indicating the state's continued reliance on the public duty rule to shield municipalities in negligent building inspection suits.

Florida recently changed its stance regarding the public duty rule. Despite its prior condemnation of the doctrine,[115] the Florida Supreme court returned to the public duty rule in *Trianon Park Condominium Association v. City of Hialeah*.[116] In *Trianon* the roof of a sixty-five unit condominium collapsed three years after the City of Hialeah issued a certificate of occupancy. Filing a class action suit, the condominium association alleged that the city was negligent in approving building plans, inspecting the construction, and issuing a certificate of

113. *Id.* at 55. In reaching its conclusion, the *Dinsky* court looked to other jurisdictions that addressed the issue of municipal liability for negligent building inspection. The court agreed with the states which hold that a city owes a duty only to the general public. *Id.*

114. *C.f.* Connerty v. Metropolitan Dist. Comm'n, 398 Mass. 140, 495 N.E.2d 840 (1986) (municipal corporation lacked duty to licensed master clam digger for damages to his business allegedly caused by discharge of raw sewage into harbor by municipal corporation); Appleton v. Town of Hudson, 397 Mass. 812, 494 N.E.2d 10 (1986) (town lacked duty to individuals killed by drunk driver despite alleged negligence of municipal officials).

115. The state of Florida has an inconsistent history regarding municipality liability for the negligence of municipal employees. Florida specifically renounced the sovereign immunity doctrine in Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (superseded by FLA. STAT. ANN. § 768.28 (West 1986)). *See supra* note 25. Ten years later, however, Florida established a new means of shielding municipalities from liability. In Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967) the Florida Supreme Court adopted the public duty doctrine. *Modlin* arose when an overhead storage mezzanine in a store collapsed and killed a customer. Rejecting the court of appeals determination that the building inspection function was discretionary, the Florida Supreme Court applied the public duty doctrine to find the city not liable. *Id.* at 73-76.

Florida changed its stance again in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). *See supra* notes 62, 70. In *Commercial Carrier*, applying the discretionary/ministerial distinction, the Florida Supreme Court refused to find the city liable for the negligence of municipal employees. 371 So. 2d at 1019. The court rejected the public duty doctrine adopted in *Modlin*, stating:

> [W]e believe it to circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person. This is the "general duty-special duty" dichotomy emanating from *Modlin*. By less kind commentators, the theory has been characterized as one which results in a duty to none where there is a duty to all.

Id. at 1015.

116. 468 So. 2d 912 (Fla. 1985).

occupancy. The trial court found that the city breached its duty to the association by failing to enforce the code provisions properly.[117] Using a discretionary/ministerial analysis, the Florida appellate court affirmed the trial court's judgment against the city.[118] In a split decision, the Florida Supreme Court reversed the appellate court's decision,[119] holding the city immune from liability for its police functions, including negligent building inspection.[120] Applying a general duty/special duty test, the court found that city building inspectors owed no duty to individual citizens.[121] Relying on basic negligence principles, the court reasoned that government liability can be based only on a common law or statutory duty.[122] The court refused to find a common law duty owed to individuals that required a governmental entity to enforce the law.[123]

In addition to applying the general duty/special duty test, the *Trianon* court employed the planning/operational analysis and declared building inspection a discretionary activity.[124] The court's broadening of the discretionary exception immunizes a majority of governmental activities. Thus, in Florida, municipal immunity in negligent inspec-

117. *Id.* at 915. The condominium association sued the developers as well as the City of Hialeah. *Id.* The parties settled action against the developer and the jury returned a verdict against the city in the amount of $291,000. *Id.* The court reduced the award by the amount of the settlement with the developer and further limited it to the amount of recovery permissible under Florida's tort liability act. *Id.*

Florida enacted a tort claims act which provides that state and local governments, and their agents, shall be liable for tort claims to the same extent as private individuals. FLA. STAT. § 768.28 (1986). *See supra* note 24 and accompanying text. Section 768.28(5) limits liability to $100,000 for a claim by one person to the aggregate sum of $200,000 per action, and prohibits recovery of punitive damages. FLA. STAT. § 768.28(5) (1986). *See infra* Part IV(B) of this Note, notes 191-194.

118. 423 So. 2d 911 (Fla. App. 1982). The appellate court concluded that the city's inspection and certification of buildings is an operational level activity subject to tort liability if negligently performed. *Id.* at 913. The court reversed the trial court damage award of $50,000, holding the city liable instead for $100,000. *Id.* at 914.

119. *Id.* at 912.

120. *Id.* at 919, 923.

121. *Id.* at 917-18, 923.

122. *Id.* at 917.

123. *Id.* at 918. The court cited the RESTATEMENT (SECOND) OF TORTS § 315 (1964). The court reasoned that because the city had no duty to force developers to comply with the codes, the city had no duty to the victims injured by noncompliance. *Id. See Rebuilding the Wall, supra* note 10, at 355-59.

124. 468 So. 2d at 918-19. To determine whether the municipality should be liable for negligent building inspection, the court applied the *Evangelical* test adopted by the Florida court in *Commercial Carrier. See supra* note 68 and accompanying text.

tion suits is the rule rather than the exception.[125]

2. States Rejecting the Public Duty Rule

States that have rejected the public duty doctrine relied on the same common law principles of duty applied in actions between private individuals. These state courts hold that a special duty arises when a building official undertakes an inspection. In view of the abrogation of sovereign immunity, these jurisdictions find the general duty/special duty doctrine no longer viable.

Although its state legislature has since reversed the judicial trend, Alaska was the first jurisdiction to renounce specifically the public duty rule.[126] In *Adams v. State*, like *Hage*,[127] the victims of a hotel fire alleged their injuries resulted from the city's negligent fire safety inspection.[128] The state asserted that the inspector owed a duty only to the general public and not to any individual.[129] Rejecting the state's argument, the court held the public duty doctrine inapplicable for two reasons. First, the duty imposed by the fire inspection was not a duty to the public at large.[130] Rather, the fire safety codes created a duty to a limited class of beneficiaries—those injured in the hotel fire.[131] Second, the court stated that the public duty doctrine is really a form of sovereign immunity.[132] The court found that the judicially-created doctrine

125. *See generally Rebuilding the Wall, supra* note 10; Note, *How Much Wrong Can the King Do? A Look at the Modern Sovereign Immunity Doctrine in Florida*, 13 STETSON L. REV. 359 (1984).

126. Adams v. State, 555 P.2d 235, 241-42 (Alaska 1976) (superseded by ALASKA STAT. § 09.65.070 (1983)). The statute, amended in 1977, states:

> No action for damages may be brought against a municipality or any of its agents . . . if the claim . . . is based on the failure of the municipality, or its agents, officers, or employees, when the municipality is neither owner nor lessee of the property involved . . . to inspect property . . . discover a violation of any statute . . . to abate a violation . . . or a hazard to health or safety.

ALASKA STAT. § 09.65.070(c) & (d) (1987).

127. *See supra* notes 104-108 and accompanying text.

128. 555 P.2d at 236-38. Eight persons died in the hotel fire. More than eight months prior to the fire, the state undertook a fire safety inspection and found several significant hazards. *Id.* Although the inspector discussed the code violations with the hotel manager, the inspector took no further steps to remedy the violations. *Id.*

129. *Id.* at 241.

130. *Id.*

131. *Id.*

132. *Id.* at 241-42. The court stated, "We consider that the 'duty to all, duty to no one' doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine."

contradicted Alaska's statutory waiver of sovereign immunity.[133]

Relying in part on the *Adams* rationale, the Iowa Supreme Court in *Wilson v. Nepstad*[134] rejected the public duty defense to municipal liability for negligent building inspections.[135] *Wilson* consisted of five consolidated cases involving deaths and injuries resulting from a fire in a municipally inspected apartment building.[136] The injured residents sued the City of Des Moines,[137] alleging that building code ordinances required the city to perform inspections and enforce the safety codes.[138] The residents asserted that the city's negligent inspection[139] seven months earlier had caused the fire.[140] Contending that municipal inspection laws protect the general public, the city claimed it lacked a duty of care to the fire victims.[141] Reversing the trial court's dismissal, the Iowa Supreme Court held that a municipality may be liable in tort for negligent inspections conducted pursuant to state statutes and city ordinances.[142] Although it noted the trend toward municipal liability for negligent building inspections,[143] the court refrained from determining the validity of the general duty/special duty distinction.[144] Instead, the court examined the specific and novel language of Iowa's statutory waiver of tort immunity[145] and concluded that the legislature intended to impose liability on municipalities for negligent inspection

133. *See supra* note 132.

134. 282 N.W.2d 664 (Iowa 1979).

135. *Id.* at 674.

136. *Id.* at 666.

137. *Id.*

138. *Id.*

139. *Id.* at 667. Plaintiffs contended the city was liable for: (1) breach of the common law duty of reasonable care, and (2) breach of various statutory duties relating to building and fire safety inspection. *Id.*

140. *Id.* at 666.

141. *Id.* at 667. Citing eight jurisdictions adhering to the public duty doctrine, the city urged the court to apply the doctrine in this case. *Id.*

142. *Id.* at 673.

143. *Id.* at 667. The court pointed out that the " 'public duty' doctrine has lost support in four of the eight jurisdictions relied upon by the city." *Id. See supra* note 141.

144. *Id.* at 668 ("Although this [public duty doctrine] is a well-respected doctrine, we do not find it applicable here.") (quoting *Adams*, 555 P.2d at 241-42; *see supra* note 126).

145. *Id.* at 669-72. *See generally Demise, supra* note 10, at 1430-44 (criticizing the *Wilson* court's treatment and interpretation of the Iowa statutory waiver of sovereign immunity).

and enforcement of building safety codes.[146]

Wisconsin recently ruled on municipal building inspector liability in *Wood v. Milin*.[147] In *Wood*, homeowners sued the building and plumbing inspector of the Town of Vernon following the partial collapse of their residence.[148] The homeowners alleged that the inspector negligently failed to detect building and plumbing code violations that caused the house to collapse.[149] Affirming the circuit court's ruling in favor of the homeowners,[150] the Supreme Court of Wisconsin held that the public duty doctrine was inconsistent with the state's law of municipal tort liability.[151]

The *Wood* court relied on the earlier landmark decision in *Coffey v. City of Milwaukee*[152] that rejected the public duty doctrine.[153] Declaring the public duty/private duty distinction artificial, *Coffey* held that any duty owed to the public generally is also owed to individual citizens.[154] Thus, Wisconsin courts strongly adhere to the rule of municipal liability for negligent building inspections.[155]

146. *Id.* at 669 ("[I]t is the specific and novel language of the Iowa statutes, clearly indicating a legislative intent to impose liability under these admitted circumstances, which distinguishes Iowa law from that found in the decisions relied on by the city.").

147. 397 N.W.2d 479 (Wis. 1986).

148. *Id.*

149. *Id.* at 480. At trial, the court heard expert testimony that the construction and location of the rafters and floor joists were defective and in violation of the building code. *Id.* Plaintiffs also introduced evidence that plumbing code violations contributed to the home's collapse. *Id.*

150. The trial jury found the town building and plumbing inspector negligent in performing his inspection duties. *Id.* The jury verdict awarded $60,183.02 to the homeowners. *Id.* The circuit court modified the damages award. *See infra* Part IV(B) of this Note, notes 191-194.

151. 397 N.W.2d at 482.

152. 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

153. Wisconsin previously rejected the public duty doctrine in Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). The *Coffey* court stated: "The 'public duty'—'special duty' distinction espoused in the cases cited by the City of Milwaukee and LeGrand [building inspector] set up just the type of artificial distinction between 'proprietary' and 'governmental' functions which this court sought to dispose of in *Holytz*." 247 N.W.2d at 139.

154. *Id.* *See supra* note 153.

155. No judges dissented in either *Coffey*, 74 Wis. 2d 526, 247 N.W.2d 132 (1976), or *Wood*, 397 N.W.2d 479 (Wis. 1986).

D. *Common Exceptions*

Regardless of the jurisdiction's stance on the public duty rule, courts generally impose municipal liability in certain distinct situations. Two such situations are the inherently dangerous exception and the special relationship exception.[156]

1. The Inherently Dangerous Situation

Some jurisdictions impose liability when a building official should have detected, or had actual knowledge of an inherently dangerous code violation.[157] Although New York adheres to the public duty doctrine,[158] in *Gannon Personal Agency Inc. v. City of New York*[159] the court attached municipal liability for an explosion resulting from a building official's negligent failure to detect an improperly fitted gas line in a restaurant.[160]

The inherently dangerous situation exception is part of a foreseeabil-

156. A third situation in which many jurisdictions will impose liability is when the plaintiff is a member of an identifiable class which the statute in question was intended to protect. *See, e.g.*, Runkel v. City of New York, 282 A.D. 173, 177, 123 N.Y.S.2d 485, 489 (1953), *aff'd*, 286 A.D. 1101, 145 N.Y.2d 729 (1955) (plaintiffs are members of a class that statutes intended to protect and therefore may sue to recover for personal injuries); Lorshbough v. Township of Buzzle, 258 N.W.2d 96, 103 (Minn. 1977) (pollution control statutes benefit both the general public and individuals living near the solid waste disposal sites). *See generally* Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 807 n.10 (Minn. 1979), discussed *supra* in text accompanying notes 100-102.

157. *Cracraft*, 279 N.W.2d at 806. *C.f.* Hansen v. City of St. Paul, 298 Minn. 205, 214 N.W.2d 346 (1976) (city held liable for official's negligence in failing to impound street dogs known by officials to be vicious and prone to attack).

158. *See* Motyka v. City of Amsterdam, 15 N.Y.2d 134, 256 N.Y.S.2d 595 (1965) (leading New York case adopting the public duty rule to shield municipality from liability in a negligent inspection action arising from a fatal apartment building fire).

159. 103 Misc. 2d 60, 425 N.Y.S.2d 446 (1979), *aff'd*, 438 N.Y.S.2d 661 (1981), *rev'd sub nom.* O'Connor v. New York, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983)). The Court of Appeals of New York reversed and remanded the lower court's decision. The court refused to find a special relationship between the injured plaintiffs and the city that would result in liability for negligent inspection. 447 N.E.2d at 34-35. *See infra* text accompanying notes 163-173 for discussion of the special relationship inspection.

160. 103 Misc. 2d 60, 425 N.Y.S.2d 446. *Gannon* involved a gas explosion in a New York City restaurant that killed twelve people and left many other injured. *Id.* at 62, 425 N.Y.S.2d at 448. A private contractor who put a new type of gas line in the restaurant failed both to install a shut-off valve inside the building in case of a leak and to cap and close the end of one gas pipe. *Id.* at 65, 425 N.Y.S.2d at 448. Although these two serious errors were obvious code violations, they went unnoticed by the building inspector who issued an official approval. *Id.*

ity test articulated by courts addressing the issue of negligent building inspection liability.[161] For example, one court stated that whether an actionable duty exists depends on whether the building inspector could have foreseen that negligence in performing his duties might result in personal harm.[162]

2. The Special Relationship Exception

In most negligent inspection suits, defendant municipalities assert that they lack a duty to the victims of an official's tortious conduct.[163] Some jurisdictions, however, make an exception to the general rule of nonliability if a relationship developed between an injured plaintiff and an agent of the municipality.[164]

Although the State of Washington followed the public duty doctrine at the time,[165] in *Campbell v. The City of Bellevue*[166] the court found the city liable for an electrical inspector's negligence.[167] The inspector discovered violations of the city's electrical ordinances in an underwater lighting system[168] and assured the plaintiff that he would remedy the problem.[169] The inspector's failure to comply with the code and disconnect the lighting system resulted in the electrocution of the plaintiff's decedent.[170] According to the *Campbell* court, the inspector's knowledge of the lighting system's violations and the extreme danger it posed to the residents created a special relationship between

161. *See* Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (Wisconsin Supreme Court rejected the public duty doctrine and held the city liable for negligent inspection because it was foreseeable that a building inspector's negligence might harm someone).

162. Wood v. Milin, 397 N.W.2d 479, 483 (Wis. 1986).

163. *See supra* Part III(C) (notes 92-125 and accompanying text).

164. Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806-07 (Minn. 1979). *See generally National Survey, supra* note 10, at 549-52.

165. The Supreme Court of Washington rejected the public duty doctrine in 1981 in J & B Dev. Co. v. King County, 29 Wash. App. 942, 631 P.2d 1002 (1981). Therefore, the Supreme Court of Washington decided Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975), when the state's courts still adhered to the public duty rule. *See also* Note, *Campbell v. City of Bellevue: Municipal Liability for Negligent Inspections*, 12 WILLIAMETTE L.J. 188 (1975).

166. 85 Wash. 2d 1, 530 P.2d 234 (1975).

167. 85 Wash. 2d at 10, 530 P.2d at 239.

168. *Id.* at 4, 530 P.2d at 236.

169. *Id.*

170. *Id.* at 4-5, 530 P.2d at 235-36. The plaintiff's wife was electrocuted while trying to save her son who had fallen into a creek. *Id.*

the victims and the municipality.[171] In turn, this relationship created a duty on the part of municipality toward the individual victims, rather than merely toward the general public.[172] By the inspector's breach of that duty, the city incurred liability.[173]

IV. ALTERNATIVES TO RESOLVE DISPARATE TREATMENT OF MUNICIPAL LIABILITY

Although the law is unsettled, there is a trend toward holding municipalities liable for the negligence of their building inspectors.[174] To analyze the conflicting positions on negligent municipal inspections, one must examine the two conflicting goals: shielding municipalities from the economic burden of liability and compensating the victims of a public official's tortious conduct.[175] The following section looks at the policy arguments in favor of these goals and proposes two alternatives to the disparate treatment of municipal liability.

A. *Policy Arguments*

1. Arguments Favoring Municipal Immunity for Negligent Inspection

Advocates of municipal immunity argue that imposing liability on municipalities for negligent inspections would deplete municipal funds and promote carelessness in the construction industry.

The predominant concern is that imposing liability for negligent inspection would make the governmental entity and its taxpayers insurers for all construction defects.[176] One court contended that approving

171. *Id.* at 10, 530 P.2d, at 239. The court reasoned that since the inspector undertook the inspection and conferred with the residents regarding code violations, he thereby created a special relationship between himself and the plaintiff's decedent. *Id.*

172. *Id.* Although the court recognized a general rule of nonliability, it explained that the building inspector's surveillance of the defective underwater lighting system, and his subsequent assurance to the residents that he would remedy the problem, caused the plaintiff to rely on his representations, thereby imposing a duty on the municipality to the plaintiff's decedent. *Id.* at 5, 530 P.2d at 236.

173. *Id.* at 10, 530 P.2d at 239. Other courts applied the special relationship exception to find municipal liability for negligent inspection. *E.g.*, Smullen v. City of New York, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (plaintiff's decedent relied upon inspector's assurance that a trench in violation of codes did not need shoring shortly before the trench collapsed and killed him).

174. *See supra* notes 126-173 and accompanying text.

175. *See infra* notes 176-90 and accompanying text.

176. In Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912,

liability for negligent building inspections would open a Pandora's box, making municipal taxpayers fiscally responsible for many other governmental activities.[177] Local governments assert that deficiencies in building inspection operations are due to insufficient municipal funds.[178] Thus, supporters of municipal immunity assert that imposing tort liability would only exacerbate current problems.[179]

A second argument is that municipal liability would encourage the construction industry to maintain lax standards. Proponents of municipal immunity assert that the government's duty is merely to enforce compliance with building codes.[180] Under this view, private contractors are legally and fiscally responsible for penalties resulting from code violations and neglect in municipal inspection. Moreover, even when liability is imposed, building inspectors lack an incentive to perform because a city will indemnify its employees.[181] Public policy dictates that governments should not be responsible for ensuring the quality of buildings constructed or purchased by individuals.[182] Rather, the proper remedy for faulty construction lies in an action against the contractor, developer, or seller.[183]

2. Justifications for Municipal Liability for Negligent Inspection

The primary impetus for imposing municipal liability is the injustice of denying an injured plaintiff recovery from the government for its tortious conduct. Proponents of municipal liability contend that the

922 (1985), the court stated: "To give effect to Trianon's position would make the taxpayers of each government entity liable for the failure of governmental inspectors to use due care in enforcing the construction requirements of the building code. It would make the governmental entity and its taxpayers insurers for all building construction defects."

177. *Id.* The *Trianon* court also stated: "If we approved this principle for building inspections, we would also necessarily have to find governmental entities and their taxpayers fiscally responsible for the failure to use due care in carrying out their power to enforce compliance with laws regarding fire department inspections, elevator inspections." *Id.*

178. *See* Young, *Tort Judgments Against Cities: the Sky's The Limit*, 1983 DET. C.L. REV. 1509 (Mayor of Detroit discusses the permutations of municipal liability) [hereinafter cited as *The Sky's The Limit*].

179. *Id.* at 1510.

180. *See National Survey, supra* note 10, at 560.

181. *Id.*

182. Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 919-23 (1985).

183. *Id.* at 923.

imposition of liability will motivate local governments to conduct diligent inspections[184] and will emphasize the accountability of building inspectors.[185] Municipal liability might best insure against future negligent building inspections because the threat of liability would increase the care with which government officials supervise their subordinates.[186]

Courts imposing municipal liability reject the argument that failure to exempt the municipality from its negligence would result in financial disaster for several reasons.[187] First, the financial consequences of legislation are the responsibility of the legislature and should not impede judicial statutory interpretation.[188] Second, the city may be able to recover against the offending building owner.[189] Finally, state statutes imposing monetary limits on the amount recoverable in municipal tort liability suits safeguard against the depletion of municipal funds.[190] This limit on municipal liability is the focus of the following section.

B. *Placing a Cap on Damages*

As the trend of imposing municipal liability for negligent building inspection continues, many jurisdictions will retreat from their hard line immunity stance. To cushion the impending shift in liability, state legislatures may enact statutes limiting the amount recoverable from a governmental entity for negligent acts. This alternative satisfies the goals of both sides of the municipal liability debate. Although a recovery limit may offer plaintiffs the prospects of reduced recoveries,[191] it does offer some recourse to victims of government torts. At the same time, a cap on damages pacifies governmental fears about depletion of

184. *See* Wilson v. Nepstad, 282 N.W.2d 664, 673-74 (1979) ("Municipalities are not going to be motivated toward meaningful inspections while insulated from their employees' negligence with respect to these statutory duties.").

185. *Id.* The *Wilson* court implied that the threat of liability would motivate inspectors to perform their duties in a manner responsible enough to justify occupants' reliance.

186. Owen v. City of Independence, 445 U.S. 622, 652 n.36 (1980).

187. Wilson v. Nepstad, 282 n.W.2d 664, 674 (1979). *See infra* text accompanying notes 188-190.

188. *Id.*

189. *Id.* (citing Runkel v. Homelsky, 286 A.D. 1101, 145 N.Y.S.2d 729 (1955)).

190. *See infra* text accompanying notes 191-94.

191. *The Sky's The Limit*, *supra* note 178, at 1510-11.

municipal funds.[192] Several states have already enacted statutes limiting monetary recovery in governmental tort actions.[193] Such statutes allow courts to hold municipalities liable under the state statutory waiver of immunity without being concerned with the potentially disastrous financial consequences to cities.[194]

C. *Privatization of the Building Inspection Function*

Although most construction law disputes consider building inspector negligence, the liability debate has overlooked the implications of ignoring deficiencies in the building inspection system. The current approach addresses the issue whether to impose liability after the damage occurs. Societal interest requires remedying the problem in its pre-injury stages. Municipalities maintain that they lack the resources to finance improvements in the current inspection system. Likewise, municipalities have insufficient funds to pay tort judgments. Application of this circular analysis leaves citizens in substandard buildings.

Municipalities claim that imposing liability will ultimately result in the curtailment of building inspections. One court asserted that failing to inspect is better than negligently inspecting.[195] Since building inspection is a vital safeguard against injury to individual occupants, this proposition is clearly infeasible. The same court suggested that in the event of municipal withdrawal from the building inspection function, private agencies might fill the void.[196] This novel suggestion requires

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192. *See supra* notes 176-79 and accompanying text. *See also The Sky's The Limit*, *supra* note 178, at 1511. Advocating a cap on damages, Mayor Young of Detroit stated:

> Some maximum or cap must be placed on cities' liability for compensation for various kinds of losses, as is done with worker's compensation. In this way, when the city is at fault, the citizen will be fairly compensated yet the taxpayers will be protected against jury-ordered windfalls which bear no relationship to the loss suffered.

Id.

193. *See supra* notes 150 & 177 (examples of cases applying statutes that limit the amount recoverable in a tort action against a municipality). Such statutes generally limit the amount recoverable to approximately $100,000-300,000 and prohibit punitive damage awards. *See, e.g.*, ILL. REV. STAT. ch. 85, § 2-102 (1975); KY. REV. STAT. ANN. § 44.070; MINN. STAT. § 466-04 (1978); WIS. STAT. ANN. § 893.82 (West Supp. 1982).

194. *See* Wilson v. Nepstad, 282 N.W.2d 664, 674 (1979). The *Wilson* court stated that the financial consequences of legislation must be the primary responsibility of the legislature and cannot weigh heavily in the court's function of interpreting statutory language. *Id.*

195. *Id.* at 673.

196. *Id.* at 674.

examining "privatization" of the inspection function.

If one of the causes of negligent building inspection is a lack of sufficient manpower and funds, state legislatures should consider "privatization," or delegating the inspection function to the private sector.[197] Privatization is a means of financing and managing traditionally public works by private ownership under service contracts with municipal or state governments.[198] In recent years, privatization has become an attractive alternative to local government units responding to federal budget cutbacks and demands from citizens for public improvement.[199]

Although the field of privatization is still in its infancy, it has attracted much attention.[200] Advocates contend that private businesses can provide public services more efficiently and cheaply than can government.[201] A number of rationales support private delegation of municipal functions. First, it may be substantially cheaper for government to contract an activity to private actors.[202] Second, employers can base staffing and salaries on qualifications without the limitations of civil service.[203] Third, private programs have a greater

197. *See* Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986) (analyzing the constitutional implications of privatization of governmental powers) [hereinafter *Private Exercise*].

198. *See* Solmssen, *An Introduction to Privatization*, 9 URB., ST. & LOC. NEWSL. 1 (No. 1 Fall 1985) (informative introduction to the concept behind privatization) [hereinafter *An Introduction*].

199. *Id.* Typically, privatization projects entail a municipality contracting with a private corporation which provides the necessary capital, builds the necessary operating facilities, and conducts the activity at a predetermined standard. *Id.* Usually, there is a long-term service contract between the municipality and the service provider. *Id.* This is an attractive arrangement for private investors because they have an extended period of time in which to pay their obligations. *Id.*

200. *See generally* Ewel, *Privatization Comes of Age*, 17 NAT. RES. L. NEWSL. 1 (No. 1 Winter 1986) (privatization as applied in environmental functions); Cikins, *Privatization of the American Prison System: An Idea Whose Time Has Come?*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 445 (1986) (discussing privatization of the prison industries) [hereinafter Cikins]; Babitsky, *Comparative Performance in Urban Bus Transit: Assessing Privatization Strategies*, 46 PUB. AD. REV. 57 (1986) (commenting on the advantages and disadvantages of privatization of mass urban transit systems); Frug, *The Choice Between Privatization and Publicization*, 9 URB., ST. & LOC. L. NEWSL. 2 (No. 4 Summ. 1986) (criticizing privatization for reducing public involvement in governing municipal activities) [hereinafter *The Choice*].

201. *See An Introduction*, *supra* note 198, at 1.

202. *See Private Exercise*, *supra* note 197, at 657.

203. *See* Cikins, *supra* note 200, at 456-57 (discussing operational advantages and disadvantages of privatization).

capacity for flexible responses to new conditions.[204] Finally, the profit incentive increases the possibility of service improvements.[205]

As applied to the building inspection function, privatization is a desirable alternative to the current municipal system. Presently, municipalities have a monopoly on the inspection function. Negligent inspection problems arise because municipalities are unable to perform their responsibility. Municipalities claim that insufficient funding and staffing cause negligence.[206] Despite the proffered justifications, municipalities clearly are unable to perform the job well. Therefore, legislatures should place the inspection function in the hands of the private sector.

Privatization of the building inspection function would end the debate over whether to impose municipal liability for a building official's negligence. If a negligence action arises, courts could impose liability on the private inspection firm.[207] The profit incentive and the threat of liability would motivate private inspectors to conduct responsible inspections. Moreover, private firms would have access to levels of expertise generally unavailable to governments.[208] Thus, a building inspection would be more than a superficial review of plans and structures.[209] Rather, a private firm could supply inspectors with the skills necessary to detect latent faults and defects in construction.

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204. *Private Exercise, supra* note 197, at 654-55. Government operates under special demands for consistency and regularity that do not apply to private actors. *Id.* Private corporations can operate with greater flexibility, enabling them to react well to new developments and problems. *Id.* In turn, this tends to speed up the decision-making process.

205. Cikins, *supra* note 200, at 457. However, greed could permeate governmental functions that were previously shielded from the effects of private self-interest, ultimately leading to corruption. *See The Choice, supra* note 200, at 17.

206. *See supra* notes 176-79 and accompanying text.

207. Although initially the insurance premiums would be high for these private surveillance firms, many privatization projects are based on some form of tax-exempt financing plan in which a governmental entity issues tax-exempt industrial development bonds and lends the proceeds to a private party who constructs and owns the facility. *An Introduction, supra* note 198, at 1. Thus, the initial expenditure is assisted by the state or local government.

208. *See Private Exercise, supra* note 197, at 656-57. Often, a highly qualified person may be too expensive for the government to hire, or may not desire to work for the government for other reasons. *Id.* A private inspection firm therefore may be able to attract employees of greater expertise than those hired by the government. *Id.*

209. Several building inspectors in rapidly developing areas, such as Florida, have an overwhelming number of inspections to conduct each day. The result is often a superficial review of plans for construction, or a stroll through a construction site, look-

V. CONCLUSION

Municipal liability for negligent building inspection is a controversial area. Notwithstanding judicial and statutory abolition of sovereign immunity, many jurisdictions continue to shield municipalities from liability for the tortious conduct of their officers. Court-created doctrines that distinguish between governmental activities help preserve municipal immunity for negligent building inspections.

Currently, there is a trend toward imposing municipal liability for the negligent performance of a building inspector's duties. This movement is justified because present and potential building occupants rely on a municipal inspector's decision that the structure meets safety code standards. Municipalities fear that imposition of liability will deplete municipal funds. State legislatures, however, can prevent financial hardship by enacting statutes limiting the amount recoverable in municipal tort actions.

Although placing a cap on damages is a helpful alternative, it fails to remedy the deficiencies in the municipal inspection system. Local governments should recognize their inability to properly carry out the inspection function and should relinquish their monopoly on surveillance to the private sector. Although holding a municipality liable for the negligent performance of its building officials will afford postdamage recourse to injured victims and assure accountable inspection, privatization of the inspection function will best deter violations and prevent injuries. Legislatures should implement privatization, placing the societal responsibility for safe buildings on the private sector.

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ing only for very obvious defects. Such inspections were condemned by the *Wilson* court. *See supra* notes 194-195 and accompanying text.

Privatization of the inspection function would avoid this type of negligent inspection for two reasons: (1) privately hired inspectors would have the requisite expertise to thoroughly survey the buildings and structures for hazardous defects and faults; and (2) the threat of personal liability would motivate private firms to stay abreast of their employees. Moreover, local governments could continue to oversee inspections by determining the standards that private firms must enforce.

* J.D. 1988, Washington University.